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London and Lexington Insurance Company  
UK, Subscribing to Policy No. QA006807;  
Those Certain Underwriters At Lloyd's,  
London and Catlin Insurance Company (UK)  
Ltd., Subscribing to Policy No. QA011608;  
Twin City Fire Insurance Company; and  
Continental Casualty Company

(Additional counsel listed on next page)

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

In re:

INDYMAC BANCORP, INC.,

Debtor,

INDYMAC MBS, INC., a Delaware  
corporation,

Plaintiff,

v.

ACE AMERICAN INS. CO., a  
Pennsylvania corporation, et al.

Defendants.

Case Nos. CV11-2950-RGK and  
CV11-2998-RGK

- (1) **NOTICE OF MOTION AND  
MOTION TO DISMISS;**  
(2) **MEMORANDUM OF POINTS  
AND AUTHORITIES**

Date: August 22, 2011  
Time: 9:00 a.m.  
Judge: Hon. R. Gary Klausner  
Courtroom: 850

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**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Defendants Those Certain Underwriters At Lloyd's, London and Lexington Insurance Company UK, Subscribing to Policy No. QA006807 and Those Certain Underwriters At Lloyds, London and Catlin Insurance Company (UK) Ltd., Subscribing to Policy No. QA011608 (erroneously sued as "Certain Underwriters at Lloyds of London, an unincorporated association"); Twin City Fire Insurance Company; Continental Casualty Company; and Zurich American Insurance Company (collectively, the "Defendants") hereby move to dismiss this action brought by Plaintiff IndyMac MBS, Inc. ("IndyMac MBS") under Fed. R. Civ. P. 12(b)(1) for want of subject matter jurisdiction.

Article III of the United States Constitution requires that this action satisfy the "Case or Controversy" requirement, which it does not, as IndyMac MBS has no standing to seek any insurance coverage declarations under the 2007-2008 and 2008-2009 policies at issue in this action.

This motion is based upon this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the accompanying Declaration of Theodore A. Boundas and exhibits attached thereto; the complete files and records in this matter; oral argument of counsel; and such other and further matters as this Court may consider.

This motion is brought following the conference of counsel pursuant to Local Civil Rule 7-3, which was completed on June 2, 2011.

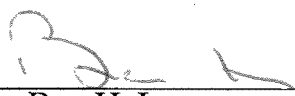
The Defendants and the other parties to this action recently filed a stipulation to extend the response date to the complaint. That stipulation is intended to allow the parties an opportunity to discuss possible means to coordinate the manner in which these three actions are adjudicated, with the hope that the parties may be able to present a proposal, or several alternatives, to this Court for its consideration. The Defendants are filing this motion at this time out of an abundance of caution—the response date on this action is June 7, 2001 and Defendants concluded that they did

1 not want to let that date pass if the Court had not yet entered an order on the  
 2 stipulation. Even though they are filing this motion, the Defendants believe that it  
 3 would be most productive for the parties to work among themselves and with the  
 4 Court in an effort to develop procedures designed to determine coverage issues in  
 5 an efficient and organized manner. Defendants do not intend to derail those efforts  
 6 by filing this motion and consciously selected a hearing date that should allow time  
 7 for all concerned to know whether that process will bear fruit.

8 PLEASE TAKE FURTHER NOTICE that, unless otherwise ordered by the  
 9 Court, Local Civil Rule 7-9 requires that any written response to this motion be  
 10 filed and served no later than twenty-one (21) days before the hearing date.

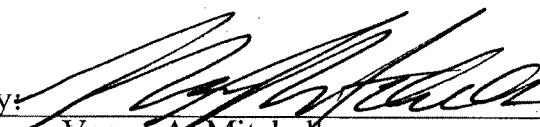
11 Dated: June 7, 2011

BEN H. LOGAN  
 STEPHEN H. WARREN  
 JUSTINE DANIELS  
 O'MELVENY & MYERS LLP

14 By:   
 15 Ben H. Logan  
 16 Attorneys for Defendants  
 17 Those Certain Underwriters At Lloyd's,  
 18 London and Lexington Insurance  
 19 Company UK, Subscribing to Policy  
 20 No. QA006807; Those Certain  
 Underwriters At Lloyd's, London and  
 Catlin Insurance Company (UK) Ltd.,  
 Subscribing to Policy No. QA011608;  
 Twin City Fire Insurance Company; and  
 Continental Casualty Company

21 Dated: June 7, 2011

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 VEENA A. MITCHELL  
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24 By:   
 25 Veena A. Mitchell  
 26 Attorneys for Defendant  
 27 Zurich American Insurance Co.  
 28

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF FACTS

During the relevant time, IndyMac Bancorp, Inc. (“IndyMac Bancorp”) was the ultimate corporate parent of the plaintiff here, IndyMac MBS, Inc. (“IndyMac MBS”). IndyMac Bancorp obtained from some of the Defendants directors’ and officers’ liability insurance that afforded specified coverage for claims made during the March 1, 2007 to March 1, 2008 Policy Period. *See* Ex. 1, First Amended Complaint ¶¶ 13, 51, 52.<sup>1</sup> Prior to the expiration of the 2007-2008 policies, IndyMac Bancorp secured further insurance from a different subset of the Defendants with a Policy Period of March 1, 2008 to April 1, 2009. *Id.* ¶¶ 51, 53.<sup>2</sup>

At the time it obtained these policies, IndyMac Bancorp was the parent of IndyMac Bank, F.S.B. (the “Bank”), which in turn was the parent of IndyMac MBS. *Id.* ¶ 13. On July 11, 2008, the Office of Thrift Supervision closed the Bank and appointed the Federal Deposit Insurance Corporation as its receiver. *Id.* The plaintiff asserts that subsequently the ownership of Indy Mac MBS was transferred to IndyMac Federal, F.S.B. (“IndyMac Federal”) and is now held by the federal receivership estate for IndyMac Federal. *Id.* On July 31, 2008, IndyMac MBS filed a petition for liquidation under chapter 7 of the Bankruptcy Code.

The instant lawsuit brought by IndyMac MBS names a number of insurers and former directors and officers of IndyMac Bancorp, and seeks wide-ranging

<sup>1</sup> All exhibits to this motion are attached to the Declaration of Theodore A. Boundas In Support of the Motion to Dismiss filed concurrently herewith.

<sup>2</sup> As for the Defendants joining in this motion, Defendants Those Certain Underwriters At Lloyd’s, London and Lexington Insurance Company UK, Subscribing to Policy No. QA006807 issued the primary policy (with a \$10 million limit of liability) in the 2007-2008 Policy Period. *See* Ex. 1, First Amended Complaint, Ex. A. Defendants Those Certain Underwriters At Lloyd’s, London and Catlin Insurance Company (UK) Ltd., Subscribing to Policy No. QA011608 issued the primary policy (with a \$10 million limit of liability) in the 2008-2009 Policy Period. *See id.*, Ex. I. Defendant Zurich American Insurance Co. issued the first excess policies (with a \$10 million limit of liability) in both the 2007-2008 and 2008-2009 Policy Periods. *See id.*, Exs. B, J. The remaining Defendants joining in this motion issued excess policies in the 2008-2009 Policy Period. *See id.*, Exs. K, L.

1 coverage declarations under these 2007-2008 and 2008-2009 policies for 12  
 2 underlying matters. Most of these underlying matters do not involve IndyMac  
 3 MBS. Specifically, IndyMac MBS seeks judicial determinations that IndyMac  
 4 MBS is entitled to coverage under the 2007-2008 policies for the three underlying  
 5 actions in which it has been named, and that certain Defendant-insurers wrongfully  
 6 paid uncovered, excessive, or unreasonable amounts from certain of the 2007-2008  
 7 policies that do not exhaust those policies' limits of liability. *See id.* ¶¶ 116-124,  
 8 134-35. IndyMac MBS also seeks determinations that claims asserted by others are  
 9 covered by the 2008-2009 policies even though IndyMac MBS has submitted no  
 10 claims under the 2008-2009 policies. *See id.* ¶¶ 94 - 115. IndyMac MBS also  
 11 seeks declarations under both the 2007-2008 and 2008-2009 policies with respect to  
 12 nine underlying matters to which it is not a party—and for which, accordingly, it  
 13 does not seek insurance coverage. *See id.* ¶¶ 93-115, 125-133. IndyMac MBS  
 14 contends, and seeks declarations, that many of these underlying matters are not  
 15 covered under any of the policies. *See id.* ¶¶ 95, 99, 103, 107, 111. IndyMac MBS  
 16 never alleges that it has satisfied the \$2.5 million retention applicable to it under the  
 17 policies or that the exhaustion of such retention is imminent.

18 For the reasons stated below, this action should be dismissed for want of  
 19 subject matter jurisdiction, because IndyMac MBS lacks standing to obtain the  
 20 declaratory relief it requests against the Defendants joining in this Motion.<sup>3</sup>

## 21 **II. ARGUMENT**

22 This action should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of an  
 23 Article III “Case or Controversy.” *See Rhoades v. Avon Prods., Inc.*, 504 F.3d  
 24 1151, 1157 (9th Cir. 2007) (“in a declaratory relief action, . . . a true ‘case or  
 25 controversy’ is required to withstand a Rule 12(b)(1) motion for lack of  
 26 jurisdiction”) (quoting *Fleck & Assocs., Inc. v. Phoenix, An Arizona Mun. Corp.*,

27 <sup>3</sup> There are a variety of additional reasons why IndyMac MBS’s allegations and  
 28 claims are baseless on the merits, but for purposes of this motion, Defendants focus  
 solely on threshold jurisdictional defects in IndyMac MBS’s complaint.

1 471 F.3d 1100, 1103-04 (9th Cir. 2006)).

2 To satisfy Article III's case or controversy requirement, [a plaintiff]  
 3 must establish standing to sue. "[T]he irreducible constitutional  
 4 minimum of standing contains three elements": the plaintiff must  
 5 demonstrate (1) an injury-in-fact, (2) causation, and (3) a likelihood  
 6 that the injury will be redressed by a decision in the plaintiff's favor.  
 7 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130,  
 8 119 L.Ed.2d 351 (1992). Because the court's role is "neither to issue  
 9 advisory opinions nor to declare rights in hypothetical cases," the case  
 10 or controversy standard also requires that a claim be ripe for review.  
 11 *Thomas [v. Anchorage Equal Rights Comm'n]*, 220 F.3d [1134,] 1138  
 12 [(9th Cir. 2000) (en banc)] ("The constitutional component of the  
 13 ripeness inquiry is often treated under the rubric of standing. . .").

14 *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010).  
 15 The standing requirement also calls upon the courts to "satisfy themselves that 'the  
 16 plaintiff has alleged such a personal stake in the outcome of the controversy' as to  
 17 warrant his invocation of federal-court jurisdiction." *Summers v. Earth Island*  
 18 *Institute*, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-  
 19 99 (1975) (Court's emphasis)).<sup>4</sup>

20  
 21 <sup>4</sup> Rule 12(b)(1) jurisdictional attacks can be either "facial" or "factual"—with facial  
 22 attacks being confined to the allegations. *White v. Lee*, 227 F.3d 1214, 1242 (9th  
 23 Cir. 2000). "With a factual Rule 12(b)(1) attack, however, a court may look  
 24 beyond the complaint to matters of public record without having to covert the  
 25 motion into one for summary judgment. . . . It also need not presume the  
 26 truthfulness of the plaintiffs' allegations." *Id.* at 1242 (citation omitted); *see also*  
 27 *Fed. Election Comm'n v. Adams*, 558 F. Supp. 2d 982, 987 (C.D. Cal. 2008) (court  
 28 "may review any evidence, such as affidavits and testimony," on Rule 12(b)(1)  
 motion) (quoting *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988)).  
 "The party invoking federal jurisdiction"—IndyMac MBS here—"bears the burden  
 of establishing the[] elements" of standing. *Lujan*, 504 U.S. at 561; *see FW/PBS,*  
*Inc. v. Dallas*, 493 U.S. 215, 231 (1990).



IndyMac MBS's lawsuit, which seeks a declaration of rights regarding the 2007-2008 and 2008-2009 policies, fails Article III's standing requirements for two reasons: (1) IndyMac MBS lacks standing to request any declaration regarding the 2008-2009 insurance policies because it has no actual stake in the claims it is asserting, as IndyMac MBS has not requested and cannot request coverage under those policies; and (2) IndyMac MBS has no standing to request any declaration regarding the 2007-2008 insurance policies because it has suffered no injury-in-fact, as its claims are too contingent, remote, and speculative.

**A. IndyMac MBS Has No Stake In The Coverage Provided By The 2008-2009 Policies.**

IndyMac MBS lacks standing to seek declaratory relief regarding the 2008-2009 policies, because IndyMac MBS has no personal stake in the outcome of the coverage determinations it requests. *See Summers*, 129 S. Ct. at 1149; *see also Lujan*, 504 U.S. at 560 (plaintiff must show injury to a "legally protected interest"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) ("Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury'") (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

IndyMac MBS lacks the required personal stake in the outcome of any coverage questions involving the 2008-2009 policies because it has alleged no—and, indeed, has no—interest in the 2008-2009 policies. In its complaint, IndyMac MBS alleges that it is named as a defendant in litigation it refers to as the "MBS Litigation" (Ex. 1 ¶ 73), the "FHLB Chicago Litigation" (*id.* ¶ 78), and the "FHLB Indianapolis Litigation" (*id.* ¶ 79). IndyMac MBS contends that "the MBS Litigation may be covered under . . . the First Tower," *i.e.*, the 2007-2008 policies. Similarly, IndyMac MBS alleges that the FHLB Chicago Litigation and the FHLB Indianapolis Litigation "may be covered under . . . the First Tower." *Id.* ¶¶ 121,



123.

Importantly, IndyMac MBS does not allege that it has submitted any claim for coverage under the 2008-2009 policies. Nor does IndyMac MBS allege, or seek a declaration, that any claim made against it is covered by the 2008-2009 policies. IndyMac MBS has the burden of demonstrating its standing, but since it has asserted no claims under the 2008-2009 policies, it has no basis to request judicial relief with regard to these policies. Accordingly, its complaint as against the insurers that issued the 2008-2009 policies should be dismissed.

**B. IndyMac MBS Has Suffered No “Injury In Fact” Implicating The 2007-2008 Policies.**

IndyMac MBS likewise has no standing to seek a declaration under the 2007-2008 insurance policies because it has not suffered any “injury-in-fact,” which is one of the essential elements of an Article III “Case or Controversy.” To demonstrate injury-in-fact, a plaintiff “must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized” and “actual and imminent, not conjectural or hypothetical.” *Summers*, 129 S. Ct. at 1149 (2009); *see also Lujan*, 504 U.S. at 560 (plaintiff must show “actual or imminent” harm to a “legally protected interest”).<sup>5</sup>

IndyMac MBS’s complaint lacks this essential requirement because it alleges no “actual or imminent” injury. To the contrary, the insurance coverage in the 2007-2008 policies is subject to an uninsured retention of \$2.5 million, and applies only to Loss “in excess of the applicable Retention. . . .” *See* Ex. 1, First Amended Complaint, Ex. A, Clause IV.A; *see also id.*, Insuring Clause I.C. IndyMac MBS has not alleged that this retention has been exhausted, or indeed, that such

<sup>5</sup> This inquiry is closely related to the Article III question of ripeness: “The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing’s injury in fact prong. . . . Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (citing *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)).

1 exhaustion is even imminent. Indeed, based on the most recent information  
2 available to Defendants, it appears that IndyMac MBS is not close to depleting the  
3 \$2.5 million retention amount. In a letter dated April 6, 2011, IndyMac MBS's  
4 counsel, William R. Stein, stated that "IndyMac MBS has not yet incurred  
5 \$2,500,000 in Loss under the Policy," noting that IndyMac MBS "had incurred  
6 over \$500,000" through November 2010. *See* Ex. 2 at 2.

7 "The party invoking federal jurisdiction bears the burden of establishing the[]  
8 elements" of standing—including an injury in fact that is "actual and imminent"  
9 and not "conjectural or hypothetical." *See Lujan*, 504 U.S. at 560, 561; *FW/PBS*,  
10 *Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Summers*, 129 S. Ct. at 1149. Because  
11 IndyMac MBS has not established that it has exhausted the uninsured retention of  
12 \$2.5 million, or that such exhaustion is imminent, IndyMac MBS has failed to  
13 establish an Article III Case or Controversy with respect to its request for  
14 declaratory relief under the 2007-2008 insurance policies.

15 This principle has been illustrated by a number of courts in analogous  
16 situations. For example, in *Laguna Publishing Co. v. Employers Reinsurance*  
17 *Corp.*, 617 F. Supp. 271 (C.D. Cal. 1985), the court concluded that a declaratory  
18 judgment action brought against an insurer that provided an excess layer of  
19 coverage did not satisfy the "actual controversy" requirements of the Constitution  
20 and the federal judicial code when the complaint did not allege that the plaintiff has  
21 exhausted the primary coverage. As the court explained, this action was not  
22 justiciable because the "question of [the excess carrier's] liability to Laguna may  
23 never become an issue at all.... Until [the primary carrier's] liability under the  
24 primary policy is settled, the Court cannot be certain that a controversy will arise  
25 between" the insured and the carrier that provided excess coverage. *Id.* at 273.  
26 Similarly, in *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500 (9<sup>th</sup> Cir. 1994), the  
27 Ninth Circuit Court of Appeals held that it was not proper to bring a declaratory  
28 judgment action against a carrier that provided excess coverage until the plaintiff

1 had established that the excess coverage will be triggered. *Id.* at 1505. This is true  
2 even if it is tempting to “sue all insurers in order to make a comprehensive  
3 determination of coverage.” *Id.* at 1504.<sup>6</sup>

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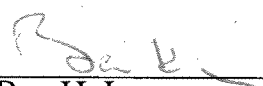
20 <sup>6</sup> *Iolab* was decided under California law. Since then, some courts have questioned  
21 whether California law requires that the primary coverage in fact be exhausted  
22 before a declaratory judgment action can be brought against a carrier that provided  
23 excess coverage. But even those cases hold that California law requires that the  
24 plaintiff “alleges a loss that exceeds the primary coverage.” *Fremont Reorganizing*  
25 *Corp., v. Federal Ins. Co.*, 2010 WL 444718, \*4 (C.D. Cal. 2010). Here IndyMac  
26 MBS has not even satisfied that loose standard, assuming *arguendo*, that it is a  
27 correct statement of California law. Moreover, irrespective of California law, a  
28 federal court being asked to issue a declaratory judgment is bound by strict federal  
standards of jurisdiction and justiciability. *Colapinto v. Esquire Deposition Serv., LLC*, 2011 WL 913251, \*3 (C.D. Cal. 2011) (“This Court, however, must apply federal law in determining Plaintiff’s standing because ‘standing to sue in any Article III court is a federal question which does not depend on the party’s prior standing in state court’; rejecting argument that plaintiff would have standing under California law). As noted above, in *Laguna Publishing*, the court decided there was no standing under the “actual case or controversy” requirements of federal law when primary coverage had not been established or exhausted

1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants hereby respectfully request that this  
3 Court dismiss this action for want of subject matter jurisdiction.


4  
5 Dated: June 7, 2011

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